

GIANCARLO GAMBOTTO & ANOR.

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v.

WCP LIMITED & ANOR.

HIGH COURT AUSTRALIA, CANBERRA
MASON CJ, BRENNAN, DEANE, DAWSON AND McHUGH JJ
8 MARCH 1995

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COMPANY LAW: *Expropriation of shares - Amendment to the articles to acquire compulsorily the shares of the minority shareholders - Whether, and if so in what circumstances it would be invalid on the basis that it is oppressive - Onus.*

On 16 April 1992, the 1st respondent (WCP) notified all its members that a general meeting would be held on 11 May 1992 to consider an amendment to WCP's articles of association. The amendment proposed was that a new Art. 20A should be included in the articles. The effect of Art. 20A was to enable any member who was "entitled for the purpose of the corporations law to 90% or more of the issued shares" to acquire compulsorily, before 30 June 1992, all the issued shares in WCP, not being shares to which the majority members were entitled, at a price of RM1.80 per share.

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The appellants do not want to sell their shares and they commenced proceedings seeking to prevent the meeting being held and the resolution being passed. The appellants contend that the purported amendment is invalid on the grounds that:

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- i. The amendment is oppressive and thus beyond the scope and purpose of the power of alteration of the articles conferred by s. 176 of the Corporations Law; and
- ii. The amendment imposes restrictions on the right to transfer shares within the meaning of s. 180 (3) of the Corporations Law.

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Held:

Per Mason CJ, Brennan, Deane & Dawson JJ:

[1] The exercise of power conferred by a company's constitution enabling the majority shareholders to expropriate the minority's shareholding for the purpose of aggrandizing the majority is valid if and only to the extent that the relevant provisions of the company's constitution so provide. The inclusion of such power in a company's constitution at its incorporation is one thing. But it is another thing when a company's constitution is sought to be amended by an alteration of articles of association so as to confer on the majority power to expropriate the shares of a minority. Such a power could not be taken or exercised simply for the purpose of aggrandizing the majority. Such a power can be taken only if (i) it is exercisable for a proper purpose and (ii) its exercise will not operate oppressively in relation to minority shareholders. In other words, an expropriation may be justified where it is reasonably apprehended that the continued shareholding of the minority is detrimental to the company, its undertaking or the conduct of its affairs - resulting in detriment to the interests of the existing shareholders generally - and expropriation is a reasonable means of eliminating or mitigating that detriment.

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[2] In the case of expropriation, the onus lies on those supporting expropriation to show that the power is validly exercised. It is for the majority to prove that alteration is valid because it was made for a proper purpose and is fair in all the circumstances. This approach ensures that the application of the relevant principles does not unduly favour the majority and it largely alleviates the sting of practical difficulties, such as poor access to information, that would otherwise confront minority shareholders.

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- a** [3] The immediate purpose of the amendment was to allow the expropriation by the majority shareholder of the shares held by the minority, including the shares held by the appellants. There is no suggestion that the appellants continued presence as members puts WCP's business activities at risk or that the appellants have in some way acted to WCP's detriment. Nor is there any suggestion that WCP sought 100 per cent ownership in order to comply with a regulatory regime. All that is suggested is that taxation advantages and administrative benefits would flow to WCP if minority shareholding were expropriated and WCP were to become a wholly-owned subsidiary of IEL. However, that cannot by itself constitute a proper purpose for a resolution altering the articles to allow for the expropriation of minority shareholder's shares. Accordingly, Art. 20A is invalid and ineffective on the basis that it was not made for a proper purpose.
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Per McHugh J:

- c** [4] A company may alter its articles of association for the purpose of enabling a shareholder to acquire the shares of existing shareholders only when the acquisition is necessary to protect or promote the interests of the company and when the alteration will not be oppressive to those shareholders. In the absence of statutory authorisation, a general contractual power to alter the articles of a company would not authorise an amendment empowering the compulsory acquisition of a member's shares. "Clear judicial authority, clear legislation or clear principle and necessity would seem to be required" before a general power to alter the articles of a company could be construed as authorising such a far reaching alteration. The power to alter the articles of association of a company, however, does not depend upon contract. It is, and long has been, authorised by statute. But, wide though that power is, its application is, subject to restrictions. One of them is that it does not extend to an alteration whose purpose is to expropriate the shares of an existing shareholder unless
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- e** the expropriation is necessary for the protection or promotion of the company's interest.

- f** [5] The company has failed to prove that the expropriation was not oppressive. It is true upon the evidence before the Court and having regard to the concessions of the appellants the price of RM1.365 per share may well have been a fair price for the shares but the onus is on the company to prove that the price was fair, that the appellants have been dealt with fairly and that a full disclosure of all matters in relation to the alteration and expropriation has been made. The evidence falls far short of proving that the company and the majority shareholders have dealt with each appellant fairly. Almost no attempt was made to made full disclosure that is required in this class of case.

[Appeal allowed with costs].

g Cases referred to:

- Allen v. Gold Reefs of West Africa Limited* [1900] 1 Ch 656 at 671 (**not foll**)
Peters' Amercian Delicacy Co. Ltd v. Heath [1939] 61 CLR 457 at 512 (**refd**)
Crompton v. Morriner Hall Pty. Ltd. [1965] 82 WN(Pt 1)(NSW) 456 at 460-461 (**refd**)
Brown v. British Abrasive Wheel Co. [1919] 1 Ch 290 (**cit**)
Sidebottom v. Kershaw, Leese & Co. [1920] 1 Ch 154 (**refd**)
h *Dafen Tinplate Co. v. Llanelly Steel Co.* [1920] 2 Ch 124 (**refd**)
Shuttleworth v. Cox Brothers & Co. (Maidenhead) [1927] 2 KB 9 (**refd**)
In re Bugle Press Ltd. [1961] Ch 270 (**refd**)
Greenhalgh v. Arderne Cinemas Ltd. [1951] Ch 286 at 291 (**refd**)
Albert Phillips and Albert Phillips Ltd v. Manufacturers' Securities Ltd. [1917] 116 LT 290 (**refd**)
Richard Brady Franks Ltd v. Price [1937] 58 CLR 112 at 135 (**refd**)
Mills v. Mills [1938] 60 CLR 150 at 187-188 (**refd**)

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Ngurli Ltd. v. McCann [1953] 90 CLR 425 at 440 (*refd*) a
Harlowe's Nominees Pty. Ltd. v. Woodside (Lakes Entrance) Oil Co. N.L. [1968] 121 CLR 483 at 493 (*refd*)
Whitehouse v. Carlton Hotel Pty. Ltd. [1987] 162 CLR 285 (*refd*)
Re John Labatt Ltd [1959] 20 DLR (2d) 159 at 163 (*refd*)
The Nova Scotia Trust Company v. Rudderham [1969] 1 NSR (2d) 379 at 398 (*refd*)
Re Sheldon; Re Whitcoulls Group Limited [1987] 3 NZCLC 100,058 at 100,060 (*cit*) b
Weinberger v. UOP Inc. [1983] 457 A2D 701 (*cit*)
Sanford v. Sanford Courier Service Pty. Ltd. [1986] 10 ACLR 549 at 563 (*refd*)
Re Shoppers City Ltd. and M. Loeb Ltd. [1969] 1 QR 449 at 454 (*refd*)
Vatcher v. Paull AC 372 at 378 (*refd*)
Hole v. Garnsey [1930] AC 472 at 491 (*refd*)
Elkington v. Shell Australia Ltd. [1993] 32 NSWLR 11 at 14 (*refd*)
Clunies-Ross v. The Commonwealth [1984] 155 CLR 193 at 201 (*refd*) c
Kingston v. Keprose Pty. Ltd (No. 2) [1987] 6 ACLC 111 at 114 (*refd*)
Mercantile Mutual Life Insurance Co. Ltd. v. Actraint No. 85 Pty. Ltd. [1990] 1 ACSR 569 at 578 (*refd*)
In re Press Caps Ltd. [1994] ch. 434 (*cit*)
Catto v. Ampol Ltd. [1989] 16 NSWLR 342 (*cit*)

Legislation referred to: d
 Corporation Law ss. 176, 180(3), 414(5)(b) & 701(2)(c)(ii)
 Companies Act 1948, s. 209 (UK)
 United States Securities and Exchange Commission r. 13e-3 (USA)

Other Sources referred to:
Company and Securities Law Journal [1993] 11, Spender, Compulsory Acquisition of Minority Shareholding, 83
Company and Securities Law Journal [1992] 10 Digby, "Eliminating Minority Shareholdings", 105, 128 e

For the appellant - in person
For the respondents - A.R. Emmett, QC/N. Perram; M/s. Norton Smith & Co.

JUDGMENT

Mason CJ, Brennan, Deane & Dawson JJ: f

This appeal raises an important question concerning the validity of an amendment to the Articles of Association of a company, the purpose of which is to enable the shareholder holding 90 per cent or more of the issued shares to acquire compulsorily shares held by minority shareholders. The appeal to this Court is brought by two minority shareholders from a decision of the New South Wales Court of Appeal (Priestley, Meagher and Cripps JJ.A.) allowing an appeal from a declaration made by McLelland J that the insertion of such an article in the Articles of Association of the first respondent ("WCP") was invalid and ineffective and from consequential orders, including an injunction. g

WCP is a limited liability company with an issued share capital of 16,980,031 ordinary shares of 20 cents each. The majority shareholders, who are wholly-owned subsidiaries of Industrial Equity Limited ("IEL"), hold 16,929,441 shares (which is approximately 99.7 per cent of the issued capital). The remaining 50,590 shares are held by minority shareholders. The appellants themselves hold 15,898 shares. The shareholding in WCP was such that IEL or a company associated with IEL could not have acquired the appellant's shares compulsorily under either s. 414 or s. 701 of the Corporations Law. See s. 414(5)(b) and s. 701(2)(c)(ii). h

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- a** On 16 April 1992, WCP notified all its members that a general meeting would be held on 11 May 1992 to consider an amendment to WCP's Articles of Association. The amendment proposed was that a new Art. 20A should be included in the articles. The effect of Art. 20A was to enable any member who was "entitled for the purposes of the Corporations Law to 90% or more of the issued shares" to acquire compulsorily, before 30 June 1992, all the issued shares in WCP, not being shares to which the majority members were entitled, at a price of \$1.80 per share.
- b** The documentation sent to the members included the text of Art. 20A, a proxy form and an expert's report valuing the shares at \$1.365 per share. The appellants concede that this was an independent and fair valuation.

- The appellants do not want to sell their shares. On 6 May 1992, after WCP indicated that the majority shareholders were likely to vote in favour of the amendment, the appellants commenced proceedings seeking to prevent the meeting being held and the resolution being passed.
- c** Those proceedings were resolved on an interim basis. WCP gave an undertaking that, if the resolution were passed, it would not acquire any shares under the new article until the conclusion of the appellants' action.

- The meeting on 11 May 1992 was attended by representatives of the eight majority shareholders and by a minority shareholder who also represented two other minority shareholders.
- d** The appellants did not attend the meeting, either personally or by proxy. The chairperson demanded a poll, presumably to put the matter beyond doubt, after the resolution had been passed unanimously on a show of hands. The three minority shareholders were the only ones to vote in the poll and they all voted in favour of the resolution.

- The appellants contended that the purported amendment is invalid on a number of grounds. It is only necessary to outline two of them for the purposes of this appeal:

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- (1) The amendment is oppressive and thus beyond the scope and purpose of the power of alteration of the articles conferred by s. 176 of the Corporations Law; and
 - (2) The amendment imposes restrictions on the right to transfer shares within the meaning of s. 180(3) of the Corporations Law.

f *The decision at first instance*

McLelland J held that the amendment was invalid and ineffective because its "immediate purpose and effect" was to permit the shares of the minority shareholders to be expropriated by the majority shareholders. According to his Honour, such an amendment amounted to "unjust oppression of those minority shareholders who object".

- In reaching this conclusion, McLelland J recognized that, despite the apparent width of s. 176(1) of the Corporations Law, the power of a company in general meeting to alter its constitution is constrained by the principles of equity. His Honour noted that the "*bona fide* for the benefit of the company as a whole" test had frequently been cited as the primary restraint since its introduction in *Allen v. Gold Reefs of West Africa Limited*. [1990] 1 Ch 656 at 671. Importantly, his Honour also noted the inappropriateness of this test in situations where a conflict had arisen between different classes or descriptions of shareholders. ([1992] 8 ACSR 141 at 143-144 citing *Peters' American Delicacy Co. Ltd. v. Heath* [1939] 61 CLR 457 at 512 per Dixon J and *Crumpton v. Morrill Hall Pty. Ltd.* [1965] 82 WN (Pt1) (NSW) 456 at 460-461 per Jacobs J).
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The decision on appeal

- In the Court of Appeal, Meagher J.A. (with whom Cripps J.A. agreed) observed that the Articles of Association of a company are "infinitely capable of amendment" subject to the Corporations Law and equitable limitations. His Honour agreed with McLelland J that the
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“*bona fide* for the benefit of the company as a whole” test was inapt in the present case. However, Meagher J.A. expressly rejected McLelland J’s suggestion that any amendment to Articles of Association permitting expropriation of minority shares under any circumstances, whether for value or not, will always constitute an oppression on the minority. Nor could it be said that the expropriation provisions of the Corporations Law ss. 701-702 (takeover schemes), s. 414 (contracts and arrangements) constituted a code governing the expropriation of shares. In the present case, the evidence demonstrated that there would be considerable tax advantages and some administrative benefits for WCP if it were to become a wholly-owned subsidiary of IEL. This fact, coupled with the fact that the level of compensation for expropriation was fair, led Meagher J.A. to conclude that the amendment was not oppressive and should have been allowed to stand.

Meagher J.A. also rejected the appellant’s argument that Art. 20A would constitute an impermissible restriction on the ability to transfer the shares affected, stating that the minority shareholders could transfer their shares freely until they received an expropriation notice, and that, even then, the shares remained transferable without restriction.

Priestly J.A. concluded that, in the circumstances of the present case, the proposed amendment was not oppressive or unjust.

Expropriation of minority shareholdings

The fundamental issue in this case is whether, and if so in what circumstances, the taking of a power by majority shareholders by amendment to the articles to acquire compulsorily the shares of the minority shareholders will be held invalid on the basis that it is oppressive. The logical starting point for a consideration of this issue is *Allen v. Gold Reefs of West Africa Limited* [1900] 1 Ch at 671, where Lindley MR stated that the power of the majority to alter the articles by special resolution:

must be exercised, not only in the manner required by law, but also *bona fide* for the benefit of the company as a whole, and it must not be exceeded.

The validity of the resolution altering the articles in that case was upheld by Lindley MR and Romer LJ, who concurred in Lindley MR’s reasons. Vaughan Williams LJ dissented on the ground that the resolution was not passed in good faith, “being really passed merely to defeat the existing rights of an individual shareholder.” (*ibid.* at 677).

Strictly speaking, *Allen v. Gold Reefs of West Africa Limited* did not involve an expropriation of shares. Rather, it concerned an alteration that gave a company a lien on fully paid shares to cover debts owed to it by the only shareholder who held such shares. Its importance for present purposes lies in the fact that the test outlined above has been used in subsequent cases in England to determine the validity of an amendment that purports to allow the majority to expropriate minority shareholdings. *Brown v. British Abrasive Wheel Co.* [1919] 1 Ch 290 is an example of such a case. There, the proposed alteration provided that a member would be “bound upon the request in writing of the holders or holder of nine-tenths of the issued shares to sell and transfer his shares... to the nominee of such holders or holder”. Astbury J, after noting that there was no allegation of *mala fides* on the majority’s part, stated: *ibid.* at 295-296:

The question therefore is whether the enforcement of the proposed alteration on the minority is within the ordinary principles of justice and whether it is for the benefit of the company as a whole. I find it very difficult to follow how it can be just and equitable that a majority, on failing to purchase the shares of a minority by agreement, can take power to do so compulsorily.

- a** The defendants contend that it is for the benefit of the company as a whole because in default of further capital the company might have to go into liquidation... [The proposed alteration] is merely for the benefit of the majority. If passed, the majority may acquire all the shares and provide further capital. That would be for the benefit of the company as then constituted. But the proposed alteration is not for the present benefit of this company.
- b** Astbury J seems to have regarded the statement of principle by Lindley MR in *Allen v. Gold Reefs of West Africa limited* as requiring both good faith and a tendency to benefit the company as a whole.
- In *Sidebottom v. Kershaw, Leese & Co.* [1920] 1 Ch 154, the English Court of Appeal upheld a proposed amendment that would empower the majority shareholders to expropriate the shares, at full value, of any shareholder who carried on business in direct competition with the company or was a director of another company carrying on such a business.
- c** Lord Sterndale MR *ibid.* at 163, and Warrington LJ *ibid.* at 172 rejected the view that Lord Lindley's statement of principle involved two distinct elements.
- However, in *Dafen Tinplate Co. v. Llanelly Steel Co.* [1920] 2 Ch 124, Peterson J took a different view of the principle. There one of the proposed alterations empowered the defendant company in general meeting to determine that the shares of any member "be offered for sale by the Board to such person or persons... as the Board shall think fit". Peterson J held that
- d** the amendment was invalid, stating: *ibid.* at 141-142:
- It may be for the benefit of the majority of the shareholders to acquire the shares of the minority, but how can it be said to be for the benefit of the company that any shareholder, **against whom no charge of acting to the detriment of the company can be urged**, and who is in every respect a desirable member of the company, and for whose expropriation there is no reason except the will of the majority, should be forced to transfer his shares to the majority or to anyone else? ... The power of compulsory acquisition by the majority of shares which the owner does not desire to sell is not lightly to be assumed whenever it pleases the majority to do so. (emphasis added)
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- Subsequently, in *Shuttleworth v. Cox Brothers & Co. (Maidenhead)* [1972] 2 KB 9 the English Court of Appeal rejected Peterson J's view of the principle, holding that it denoted one condition only, a condition expressed by Scrutton LJ, in these words namely "that the shareholders must act honestly having regard to and endeavouring to act for the benefit of the company". (*ibid.* at 23, See also *Greenhalgh v. Arderne Cinemas Ltd.* [1951] Ch 286 at 291).
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- The last English case of interest, *In re Bugle Press Ltd.* [1961] Ch 270, involved an attempted expropriation of shares in reliance on the compulsory acquisition provisions contained in s. 209 of the English Companies Act 1948. Lord Evershed MR noted that an expropriation without consent would appear to conflict with the fundamental legal principle that *prima facie*, if a person has a legal right which is an absolute right, then that person can deal with the right as he or she pleases. (*ibid.* at 285). That consideration led his Lordship to conclude that the relevant legislative provisions could not be used in such a way so as to expropriate the shares of the minority, unless there was a good reason for the expropriation: *ibid.* at 287:
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- [F]or example, that the minority shareholder was in some way acting in a manner destructive or highly damaging to the interests of the company from some motives entirely of his own.
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Harman LJ stated (*ibid.* at 287-288) that it was a “fundamental rule of company law” that majority shareholders could not expropriate a minority, unless the articles contained an expropriation provision from the outset. (cf. *Albert Phillips and Albert Phillips Ltd. v. Manufacturers’ Securities Ltd.* [1917] 116 LT 290).

Peters’ American Delicacy Co. Ltd. v. Heath [1939] 61 CLR 457. (See also *Crumpton v. Morrine Hall Pty. Ltd.*)

In that case, this Court held that an alteration of the articles which discriminated against holders of partly-paid shares in favour of the majority shareholders did not constitute a fraud on the minority. In the course of his judgment, Latham, CJ (with whom McTiernan J agreed) expressed the view that, although the power to alter articles must be exercised *bona fide*, the fact that an alteration prejudices or diminishes some (or all) of the rights of the shareholders is not in itself a ground for attacking the validity of an alteration. (*ibid.* at 480). On the contrary, his Honour considered that such an alteration must be valid unless the party complaining can establish that the resolution was passed fraudulently or oppressively or was “so extravagant that no reasonable person could believe that it was for the benefit of the company” (*ibid.* at 482). His Honour noted that the criterion of the “benefit of the company as a corporation” could not be invoked as the sole solution to the problem where the amendment in question affected the relative rights of different classes of shareholders. (*ibid.* at 481).

Dixon J also considered that the amendment was valid, although his Honour arrived at that conclusion by a different route. Dixon J declined to leave any analysis of this question to general notions of fairness and propriety, preferring instead to focus on the purpose of the proposed amendment. *ibid.* at 504,507. The steps in his Honour’s reasoning may be summarized in this way. A share in a company is property consisting of proprietary rights as defined by the Articles of Association. The power of alteration of the articles might be used by the majority shareholders for their own aggrandizement at the expense of the minority shareholders. It has seemed incredible that this could be so. But reliance on the doctrine that powers shall be exercised *bona fide* and for no extraneous purpose presents difficulties. The power of alteration is not a fiduciary power and the right to vote is an incident of property which may be exercised for the shareholder’s personal advantage. (*ibid.* at 504). *Prima facie*, rights dependent upon the articles are not enduring and indefeasible but are liable to modification or destruction by special resolution. (*ibid.* at 507). So, “if a resolution is regularly passed with the single aim of advancing the interests of a company considered as a corporate whole, it must fall within the scope of the statutory power to alter the articles and could never be condemned as *mala fides*. (*ibid.* at 507-508).

His Honour went on to say: (*ibid.* at 511-512):

The chief reason for denying an unlimited effect to widely expressed powers such as that of altering a company’s articles is the fear or knowledge that an apparently regular exercise of the power may in truth be but a means of securing some personal or particular gain, whether pecuniary or otherwise, which does not fairly arise out of the subjects dealt with by the power and is outside and even inconsistent with the contemplated objects of the power. It is to exclude the purpose of securing such ulterior special and particular advantages that Lord Lindley used the phrase ‘*bona fide* for the benefit of the company as a whole’.

His Honour considered that “benefit as a whole” is a very general expression negating purposes foreign to the company’s affairs and that the “*bona fide* for the benefit of the company as a whole” test was “inappropriate, if not meaningless”, where the amendment proposed to adjust the rights of conflicting interests. (*ibid.* at 512). Although his Honour

a did not expressly state which test or tests might be applied in such circumstances, he upheld the resolution in question on the basis that it “involved no oppression, no appropriation of an unjust or reprehensible nature and did not imply any purpose outside the scope of the power”. (*ibid.* at 513).

b In conformity with the views expressed in *Peters*, the use of the expression “for the benefit of the company as a whole” is no longer influential in the context of an alteration of the articles designed to effect or authorize the expropriation of a minority’s shares. But the expression is still in vogue in the context of the exercise by directors of their powers, particularly the power to issue or allot shares. (*Richard Brady Franks Ltd. v. Price* [1937] 58 CLR 112 at 135; *Mills v. Mills* [1938] 60 CLR 150 at 187-188; *Ngurli Ltd. v. Mc Cann* [1953] 90 CLR 425 at 440; *Harlowe’s Nominees Pty. Ltd. v. Woodside (Lakes Entrance) Oil Co. N.L.* [1968] 121 CLR 483 at 493; *Whitehouse v. Carlton Hotel Pty. Ltd.* [1987] 162 CLR 285).

c *Striking a balance*

The foregoing analysis of the authorities reveals that the Courts have struggled to strike a balance between the interests of the majority and the minority. On the one hand, the Courts have recognized that the proprietary rights attaching to shares are subject to modification, even destruction, by a special resolution altering the articles and that the power to vote is exercisable by a shareholder to his or her own advantage. On the other hand, the Courts have acknowledged that the power to alter the articles should not be exercised simply for the purpose of securing some personal gain which does not arise out of the contemplated objects of the power. The problem of stating a workable criterion arises, as Dixon J said in *Peters* [1939] 61 CLR at 507:

e in attempting to discover and fasten upon some element the presence of which will always vitiate a resolution for the alteration of Articles of Association.

The test for determining whether an expropriation is valid

f In the context of a special resolution altering the articles and giving rise to a conflict of interests and advantages, whether or not it involves an expropriation of shares, we would reject as inappropriate the “*bona fide* for the benefit of the company as a whole” test of Lindley MR in *Allen v. Gold Reefs of West Africa Limited*. The application of the test in such a context has been criticized on grounds which, in our view, are unanswerable. It seems to us that, in such a case not involving an actual or effective expropriation of shares or of valuable proprietary rights attaching to shares, an alteration of the articles by special resolution regularly passed will be valid unless it is *ultra vires*, beyond any purpose contemplated by the articles or oppressive as that expression is understood in the law relating to corporations. Somewhat different considerations apply, however, in a case such as the present where what is involved is an alteration of the articles to allow an expropriation by the majority of the shares, or of valuable proprietary rights attaching to the shares, of a minority. In such a case, the immediate purpose of the resolution is to confer upon the majority shareholder or shareholders power to acquire compulsorily the property of the minority shareholder or shareholders. Of itself, the conferral of such a power does not lie within the “contemplated objects of the power” to amend the articles. ([1939] 61 CLR at 507).

g The exercise of a power conferred by a company’s constitution enabling the majority shareholders to expropriate the minority’s shareholding for the purpose of aggrandizing the majority is valid if and only to the extent that the relevant provisions of the company’s constitution so provide. The inclusion of such a power in a company’s constitution at its incorporation is one thing. But it is another thing when a company’s constitution is sought to be amended by an alteration of Articles of Association so as to confer upon the majority

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a alteration (*Re John Labatt Ltd.* [1959] 20 DLR (2d) 159 at 163) and it presumably requires the shares to be valued by an independent expert. Whether it also requires the majority shareholders to refrain from voting on the proposed amendment is a question that is best left open at this stage.

b The second element, that the terms of the expropriation itself must be fair, is largely concerned with the price offered for the shares. Thus, an expropriation at less than market value is *prima facie* unfair, (*The Nova Scotia Trust Company v. Rudderham* [1969] 1 NSR (2d) 379 at 398; but cf. *Phillips v. Manufacturers' Securities Ltd.* [1917] 116 LT 290), and it would be unusual for a Court to be satisfied that a price substantially above market value was not a fair value. (*Re Sheldon; Re Whitcoulls Group Limited* [1987] 3 NZCLC 100,058 at 100,060). That said, it is important to emphasize that a shareholder's interest cannot be valued solely by the current market value of the shares (*Weinberger v. UOP Inc.* [1983] 457 A 2d 701).

c Whether the price offered is fair depends on a variety of factors, including assets, market value, dividends, and the nature of the corporation and its likely future (*ibid.* at 711).

Onus

d The respondents' submissions, which are based heavily on *Peters*, are premised on the proposition that an alteration allowing an expropriation is *prima facie* valid. It is conceded that the suggested presumption of validity will be rebutted if the minority shareholder proves either that the alteration was made for an improper purpose or that it is oppressive to that particular shareholder. Nonetheless, the respondents' approach, which forces the minority shareholder to shoulder a heavy onus of proof, tilts the balance too far in favour of commercial expediency and fails to attach sufficient weight to the proprietary nature of a share. A share is liable to modification or destruction in appropriate circumstances, (*Peters* [1939] 61 CLR at 507 per Dixon J) but is more than a "capitalized dividend stream": (But cf. *Sanford v. Sanford Courier Service Pty Ltd.* [1986] 10 ACLR 549 at 563; *Re Shoppers City Ltd. v. M. Loeb Ltd.* [1969] 1 OR 449 at 454) it is a form of investment that confers proprietary rights on the investor. Accordingly, in the case of expropriation, we consider that the onus lies on those supporting expropriation to show that the power is validly exercised.

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f It is for the majority to prove that the alteration is valid because it was made for a proper purpose and is fair in all the circumstances. This approach ensures that the application of the relevant principle does not unduly favour the majority and it largely alleviates the sting of practical difficulties, such as poor access to information, that would otherwise confront minority shareholders.

The validity of Art. 20A

g As the appellants did not contend that the expropriation was not fair in the sense explained above, the validity of Art. 20A hinges on whether the respondents have proved that the amendment was not made for a proper purpose. The immediate purpose of the amendment was to allow the expropriation by the majority shareholder of the shares held by the minority, including the shares held by the appellants. There is no suggestion that the appellants' continued presence as members puts WCP's business activities at risk or that the appellants have in some way acted to WCP's detriment. Nor is there any suggestion that WCP sought 100 per cent ownership in order to comply with a regulatory regime. All that is suggested is that taxation advantages and administrative benefits would flow to WCP if minority shareholdings were expropriated and WCP were to become a wholly-owned subsidiary of IEL. In our view, however, that cannot by itself constitute a proper purpose for a resolution altering the articles to allow for the expropriation of a minority shareholder's shares. In that

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regard, it is not irrelevant to note that it is difficult to conceive of circumstances in which financial and administrative benefits would not be a consequence of the expropriation of minority shareholdings by a majority shareholder.

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Accordingly, we would hold Art. 20A invalid and ineffective on the basis that it was not made for a proper purpose.

Transferability of shares

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Having reached this conclusion, it is strictly unnecessary for us to deal with the appellants' alternative argument based on s. 180(3) of the Corporations Law. However, we shall indicate our conclusions on this issue.

Section 180(3) relevantly provides as follows:

A member of a company, unless either before or after the alteration is made the member agrees in writing to be bound by it, is not bound by an alteration of the constitution made after the date on which the member became a member so far as the alteration:

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...

- (c) increases, or imposes, restrictions on the right to transfer the shares held by the member at the date of the alteration.

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The respondents submit that Art.20A does not impose any restriction on the right of the appellants to transfer their shares in WCP because those shares would remain transferable without restriction even after an expropriation notice had been issued. There is considerable force in this submission. To give s. 180(3)(c) a wider interpretation could lead to the result that any amendment empowering the expropriation of shares would be invalid, notwithstanding that the amendment was made for a proper purpose and is fair in all the circumstances. Such a result would tilt the balance too far in favour of the minority. Accordingly, the appellants' argument on this point must fail.

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In the result, we would allow the appeal with costs, set aside the orders made by the Court of Appeal and in lieu thereof order that the appeal to that Court be dismissed with costs.

McHugh J:

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The question in this appeal is whether a resolution adding a new article (Art. 20A) to the articles of association of WCP Limited ("the company") was invalid because its passing was oppressive of minority shareholders. In the Equity Division of the Supreme Court of New South Wales, McLelland J held that the "purported insertion" of Art. 20A was "invalid and ineffective" on the ground that it was an unjust oppression of the minority shareholders who objected to it. The Court of Appeal unanimously reversed his Honour's order. This Court granted special leave to appeal against the orders of the Court of Appeal.

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Property development has been the principal business of the company, which has an issued capital of 16,980,031 ordinary shares of 20 cents each. As at 16 April 1992, Acme Investments (No. 4) Pty. Ltd. and its associates (which are wholly owned subsidiaries of Industrial Equity Ltd.) owned 99.69 per cent of these shares. Seventy-one persons owned the remaining 50,590 shares of which the appellants held 15,898. The first appellant had held his shares since about 1970; the second appellant had held her shares since about 1987.

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On 16 April 1992, the secretary of the company gave notice to its members that a general meeting of the company would be held on 11 May 1992 for the purpose of considering and, if thought fit, passing a special resolution to insert a new Art. 20A in the Articles of Association. The article empowered any member who was entitled to 90 per cent or more of

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- a* the issued shares of the company to acquire all the remaining shares in the company at the price of \$1.80 per share. It authorised the majority member prior to 30 June 1992 to lodge a notice in writing with the company of an intention to acquire the minority shares. The notice was to be accompanied by a stamped transfer, executed under the common seal of the majority member on behalf of each holder of the remaining shares as transferor and on its own behalf as transferee, together with payment for the shares. Upon the receipt of the notice, the article
- b* required the company to register the majority member as the holder of the remaining shares and to cancel the share certificates of the minority shareholders. Within 14 days, the company was also required to inform the minority shareholders of the transfer and their entitlements and obligations arising out of the transfer.

- c* The notice of the meeting was accompanied by a valuation of the shares of the company prepared by a firm of accountants. The valuation showed that, as at 8 April 1992, the principal assets of the company and its subsidiaries were seven tracts of land. The book value of the land was \$15,035,000, but its market value was estimated to be \$25,977,000. The report stated that the company had been selling off its land in recent years and that "there is no intention of continuing the property development business" once the sales had been completed. The report concluded that, of the various methods of share valuation that might be used, "the
- d* net asset value basis appears to (sic) the most appropriate for the purpose of this valuation". The report declared that on a net asset value basis the fair value of the shares was \$1.365 per share. It did not include "the future income tax benefit as a separate asset". At no stage of these proceedings has it been suggested that \$1.365 is not the fair value of the shares.

- e* On 6 May 1992, the appellants commenced proceedings in the Equity Division to restrain the company from resolving to alter the articles to add Art. 20A. Upon the company undertaking not to transfer the minority shares, the meeting was allowed to take place on 11 May. The appellants did not attend. The resolution for the insertion of Art. 20A was declared carried after three minority shareholders holding 7,900 shares voted in favour of it. The majority shareholder did not vote on the resolution.

- f* Subsequently, the proceedings came before McLelland J. A director of the company gave evidence to the effect that the principal purpose of the alteration and the expropriation of minority shareholdings was to enable the company to take advantage of "unutilised tax losses" within the Industrial Equity Ltd. ("IEL") group of companies which would be available to the company, if it and its subsidiaries were wholly owned subsidiaries of IEL. The witness asserted:

- g* [I]f all the land holdings of the [company and its subsidiaries] were sold at a price equal to their current valuation, [the company] would become liable to income tax of approximately \$4.235 million. The IEL Group currently has available tax losses in excess of this amount which could be transferred to [the company] or its wholly owned subsidiaries to eliminate such a tax liability and increase the profitability of [the company].

- h* The witness also asserted that the company would save approximately \$3,000 per year in accountancy fees "by not having to prepare group accounts" and approximately \$1,300 per year as the result of terminating services in relation to maintaining the share register of the company.

The alteration of articles

- i* Section 176 of the Corporations Law provides that "[s]ubject to this Law, a company may by special resolution alter or add to its articles". Majority shareholders owe no fiduciary duty to minority shareholders when they exercise the power conferred by s. 176 to alter the Articles of Association of a company. Shareholders are not trustees for the company or for

one another (*Peters' American Delicacy Co. Ltd. v. Heath* [1939] 61 CLR 457 at 482, 504; *Ngurli Ltd. v. McCann* [1953] 90 CLR 425 at 439). Nevertheless, the Courts have sought to protect the interests of the minority by the use of equitable principles. In *Allen v. Gold Reefs of West Africa Limited* [1900] 1 Ch 656 at 671, Lindley MR after referring to the then English equivalent of s. 176(1), said:

The power thus conferred on companies to alter the regulations contained in their articles is limited only by the provisions contained in the statute and the conditions contained in the company's Memorandum of Association. Wide, however, as the language of s. 50 is, the power conferred by it must, like all other powers, be exercised subject to those general principles of law and equity which are applicable to all powers conferred on majorities and enabling them to bind minorities. It must be exercised, not only in the manner required by law, but also *bona fide* for the benefit of the company as a whole, and it must not be exceeded.

In this respect, the "general principles" by which the Court of Chancery restrained the fraudulent exercise of a power vested in a person to deal with property which that person did not own have played a leading role. In the Court of Chancery, a finding that there had been a "fraud on the power" did not necessarily denote conduct that was dishonest. It simply meant "that the power has been exercised for a purpose, or with an intention, beyond the scope of or not justified by the instrument creating the power" (*Vatcher v. Paull* [1915] AC 372 at 378). In *Peters' American Delicacy Co. Ltd. v. Heath*, [1939] 61 CLR at 480 Latham CJ, said that an alteration of articles "must be exercised *bona fide* for the benefit of the company as a whole". In the same case, Dixon J said *ibid.* at 512 that the phrase "the benefit of the company as a whole" negated "purpose foreign to the company's operations, affairs and organizations."

The statement that an alteration of articles must be for "the benefit of the company as a whole" accords with a long line of authority. (*Allen* [1900] 1 Ch at 671; *Sidebottom v. Kerhaw Leese & Co.* [1920] 1 Ch 154 at 167; *Shuttleworth v. Cox Brothers & Co. (Maidenhead)* [1927] 2 KB 9 at 23). It is a criterion that is also widely used for determining whether powers conferred on directors have been validly exercised. See, for example, *Ngurli* [1953] 90 CLR at 440; *Whitehouse v. Carlton Hotel Pty. Ltd.* [1987] 162 CLR 285 at 300-801. But it is not always a satisfactory test for determining whether a proposed alteration of the articles of a company is valid. A power to alter articles is one that can be used to alter the rights of shareholders *inter se*, and one which, in many circumstances, must give rise to conflicts of interests. In *Peters* [1939] 61 CLR at 481, 512 Latham CJ, and Dixon J both pointed out that the test of "benefit of the company as a whole" cannot be adopted as the criterion in every case. Indeed, Dixon J said: (*Ibid.* at 512):

If the challenged alteration relates to an article which does or may affect an individual, as, for instance, a director appointed for life or a shareholder whom it is desired to expropriate, or to an article affecting the mutual rights and liabilities *inter se* of shareholders or different classes or descriptions of shareholders, the very subject matter involves a conflict of interests and advantages. To say that the shareholders forming the majority must consider the advantage of the company as a whole in relation to such a question seems inappropriate, if not meaningless, and at all events starts an impossible inquiry.

Dixon J went on to say that "unless the subject matter is held outside the power, the purpose of the resolution, as distinguished from the motives of the individuals, often must be to resolve the conflict in favour of one and against the other interest" (*ibid.* at 513). It is clear, however, that his Honour did not intend to hold that an alteration of Articles of Association was valid as long as the subject matter and the purpose of the alteration were within the scope of the power. His judgment makes it plain that, although a shareholder may vote to

- a* alter the articles so as to serve his or her own interests, the exercise of the power must not involve any oppression of the minority shareholders, or any unjust or reprehensible appropriation of their rights, or be for a purpose outside the scope of the power of alteration. Thus, neither the subject matter nor the purpose of the alteration exhausts the tests for determining whether an alteration is a “fraud on the power”. Indeed, when the sole purpose of the alteration is to enable the majority shareholders to acquire the shares of minority shareholders, those tests will seldom prove helpful.
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- In my opinion, a company may alter its Articles of Association for the purpose of enabling a shareholder to acquire the shares of existing shareholders only when the acquisition is necessary to protect or promote the interests of the company and when the alteration will not be oppressive to those shareholders. In the absence of statutory authorisation, a general contractual power to alter the articles of a company would not authorise an amendment
- c* empowering the compulsory acquisition of a member’s shares. “[C]lear judicial authority, clear legislation or clear principle and necessity would seem to be required” (*Hole v. Garnsey* [1930] AC 472 at 491) before a general power to alter the articles of a company would be construed as authorising such a far reaching alteration. The power to alter the Articles of Association of a company, however, does not depend upon contract. It is, and long has been, authorised by statute. But, wide though that power is, its application is, as I have indicated, subject to
- d* restrictions. One of them is that it does not extend to an alteration whose purpose is to expropriate the shares of an existing shareholder unless the expropriation is necessary for the protection or promotion of the company’s interest.

- In the absence of an unambiguous expression of legislative intention, a general statutory power such as s. 176 is not to be construed as authorising the expropriation of private rights.
- e* This presumptive rule is strengthened when the recipient of the power is a private citizen or group of private citizens. Legislative authority for one citizen or group of citizens to acquire the private property of other citizens compulsorily is a rare and exceptional occurrence. (cf. *Elkington v. Shell Australia Ltd.* [1993] 32 NSWLR 11 at 14 per Kirby A-C.J.). A legislative grant of power to private citizens should not be taken to authorise the compulsory acquisition of the property rights of other persons unless the intention to do so appears from express words or by necessary implication. (cf. *Clunies-Ross v. The Commonwealth* [1948] 155 CLR 193 at 201). Section 176 of the Corporations Law lacks any express or necessarily implied indication that the power to alter the articles of a company can be used generally for the purpose of enabling one shareholder to acquire the shares of another. Moreover, the presence of ss. 701-703 in the Act tells strongly against the intention to grant such a power in s. 176. The section should be construed, therefore, as authorising the expropriation of shares only
- f* when it is necessary to do so in the interests of the company.
- g*

- Unsurprisingly, the Courts have refused to uphold the validity of resolutions purporting to alter the articles to allow the expropriation of a member’s shares in the absence of circumstances affecting the interests of the company. Thus, in *Brown v. British Abrasive Wheel Co.* [1919] 1 Ch 290, Astbury J, after referring to the English equivalent of s. 176(1) said that its “language, though very wide, must obviously be read with some qualification” (*ibid.* at 295). His Lordship restrained a company and its directors from holding a meeting to pass a resolution altering the articles so that the two majority shareholders, who held 98 per cent of the share capital, could acquire the shares of the remaining shareholders. Astbury J held that it was not for the benefit of the company as then constituted to add the article to
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the Articles of Association even though the company was in need of capital and the majority shareholders were prepared to provide it only if they could acquire all the shares in the company. His Lordship said: (*ibid.* at 296):

The proposed alteration is not directly concerned with the provision of further capital, nor does it ensure that it will be provided. It is merely for the benefit of the majority.

Similarly, in *Dafen Tinplate Co. v. Llanelly Steel Co.* [1920] 2 Ch 124, Peterson J held void a resolution purporting to alter a company's articles so that the shareholders in general meeting could determine that a member's shares should be offered for sale by the directors to such person as they thought fit at the fair value as determined by the directors. His Lordship said: (*ibid.* at 141):

It may be for the benefit of the majority of the shareholders to acquire the shares of the minority, but how can it be said to be for the benefit of the company that any shareholder, against whom no charge of acting to the detriment of the company can be urged, and who is in every respect a desirable member of the company, and for whose expropriation there is no reason except the will of the majority, should be forced to transfer his shares to the majority or to anyone else?

To hold that the power conferred by s. 176 cannot be used generally to acquire a member's shares does not mean that the power conferred by that section can never authorise the compulsory acquisition of a member's shares. Literally, the power to alter the Articles of Association extends to any alteration. Although, for the reasons that I have given, the generality of the power does not authorise an alteration providing for the expropriation of a member's shares by majority vote, no reason exists for holding that the power does not extend to those alterations that are necessary to protect or promote the company's interests. Thus, alteration for the purpose of expropriating a member's shares may be permissible if it is necessary to protect the company against direct competition from a member or from a company of which the member is a director. *Sidebottom* [1920] 1 Ch 154. Similarly, alteration for the purpose of expropriation may be permissible if the character or status of a member will cause harm to the company or prevent it from pursuing a legitimate commercial interest.

No distinction should be drawn between an expropriation that will enable a company to pursue a beneficial course of action that would otherwise be denied to it and an expropriation that avoids a detriment to the existing interests of the company. I see no difference between an expropriation that will enable a company to renew an existing licence to do something and an expropriation that will allow the company to acquire that kind of licence. Nor in a case like the present, can I see a valid distinction in principle between an expropriation that would allow a company to escape the incidence of a particular tax and an expropriation that would allow the company to reduce its potential tax liability.

In both cases, the proper conclusion is that the expropriation is commercially necessary to protect the assets of the company. That does not mean that an expropriation will be valid whenever the expropriation will financially benefit the company. Independently of any question of oppression, the alteration of articles for the purpose of expropriating a member's shares will be valid only if it will enable the company to pursue some significant goal, or to protect itself from some action, that is external to the company. Administrative convenience or cost, for example, could never by itself justify an alteration for the purpose of expropriation.

a *Oppression*

Moreover, the fact that an expropriation is necessary for the protection or promotion of the company does not prevent it from being oppressive to the shareholders whose shares will be acquired. When the Articles of Association contain no power to expropriate the shares of a member of the company, any resolution granting such a power is *prima facie* oppressive to those shareholders who do not wish to sell their shares. In the absence of an article authorising the expropriation of a member's shares, members have a legitimate expectation that, unless some exceptional circumstance should arise, they will be able to retain their shares until they wish to sell or until the company is wound up. Once the articles are altered to give the power of expropriation to the directors or the majority shareholders, a shareholder whose shares are liable to be expropriated is placed in the position where he or she can be forced to accept cash or debt in exchange for the shares while the majority retain their shareholding. (Spender, "Compulsory Acquisition of Minority Shareholdings", [1993] 11 *Company and Securities Law Journal* 83). Any benefits that will flow to the company from the acquisition will flow only to the remaining shareholders. (*ibid.* at 91).

Furthermore, those given the power to acquire are usually not bound to exercise their power. Often, the expropriators can time the acquisition to suit their own convenience and purposes. In periods such as that which followed the stock market "crash" of October 1987, the price of shares may be artificially depressed giving the expropriators the chance to acquire the shares at a price below their "fundamental value" (cf. Digby "Eliminating Minority Shareholdings", [1992] 10 *Company and Securities Law Journal* 105 at 124). Usually, the expropriator is a person who controls the company and who often has access to information that is denied to other shareholders and to the stock market.

d Under these circumstances, to require shareholders to sell their shares against their will is an infringement of their rights as autonomous beings to make their own decisions and to carry out their own actions. In a society and under a legal system that is predicated on its members being free and equal agents any interference with the autonomy of any individual needs to be justified if it is not to be regarded as oppressive. Because those proposing an alteration for the purpose of expropriation must justify their action, the onus must be on them to establish that there has been no oppression.

f To prevent an alteration for the purpose of an expropriation being oppressive, the expropriators will need to act fairly. In a leading American case, *Weinberger v. UOP Inc.*, [1983] 457 A 2d 701, the Supreme Court of Delaware, in dealing with a statute that enabled a corporation that was a majority shareholder in another corporation to buy out the minority shareholders and merge the two corporations, pointed out (*ibid.* at 711) that the "concept of fairness has two basic aspects: fair dealing and fair price".

g *Fair price*

Payment of compensation which accords with the market value of the expropriated shares will go a long way to preventing the expropriation from being classified as oppressive. The market price of shares on a security exchange is cogent evidence of value (*Elkington* [1993] 32 NSWLR at 22) particularly when the shares have traded in a fairly narrow band over an extended period. But the market price or even a price above the market price is not decisive of the fair value of the shares for the purpose of an expropriation. A price sufficiently high to prevent an expropriation being characterised as oppressive will need to take into account numerous factors. In *Weinberger* [1983] 457 A 2d at 711, the Supreme Court of Delaware

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said that a fair price included “all relevant factors: assets, market value, earnings, future prospects, and any other elements that affect the intrinsic or inherent value of a company’s stock”.

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Consideration of these factors may lead to the conclusion that the market price or a higher price is not the fair price of the shares.

In *Re Sheldon; Re Whitcoulls Group Limited* [1981] 3 NZCLC 100,058, however, Holland J held that the compulsory acquisition of shares at \$2 per share was fair because at the time the current market price had been \$1.65. That was the lowest price the shares had been in “the preceding three years”. Six months later the acquiring shareholder contracted to sell its shareholding for \$2.65 per share. In addition, the three independent directors of the company had asserted at the time of the acquisition that the price of \$2 was “inadequate in the light of the company’s asset backing”. Nevertheless, his Honour held that the minority shareholder had failed to prove that the price of \$2 was inadequate. The learned Judge said: (*ibid.* at 100,060).

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In the case of a company with shares quoted on the Stock Exchange it would be rare indeed that a Court could be satisfied that a price substantially higher than that ruling on the public market was anything other than a fair value for those shares.

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With great respect, I do not think that that dictum should be followed in Australia. Sharemarkets are driven by many factors, not all of them rational or fair. Even the share prices of long establish and profitable companies may fluctuate by as much as 50 per cent in the space of a year. A share is an interest, however small, in an underlying business. Outside the context of the stockmarket, it would not occur to the owner of a business to think that the fair value of his or her business could move up and down, sometimes violently, not only from week to week or day to day but during the course of a day. No doubt in the long term the share price of a company will reflect its fundamental earning capacity or value. But the histories of stockmarkets are overrun by examples of companies whose intrinsic value remained unnoticed by the market for long periods of time. The “herd mentality” exists in the stock market as in other areas of life. Judges cannot delegate to the market the duties of Courts to fix a fair price for shares.

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Wyn-Parry J asserted in *In re Press Caps Ltd.* [1949] Ch 434 at 447 that “the final test of what is the value of a thing is what it will fetch if sold”. But what it will fetch depends on when it is sold. Shareholders whose shares are expropriated have no say concerning the timing of the expropriation. In *Catto v. Ampol Ltd.* [1989] 16 NSWLR 342 at 361 Rogers A-J.A was correct, in my opinion, in refusing to accept the current market price as reflecting the fair price of shares in an application to approve a capital reduction scheme under which the minority shareholders would receive a price of \$2.78 per share which was in line with the current market price. His Honour thought that the facts of that case indicated that a price of \$4 per share paid by the majority shareholder 18 months earlier was a surer guide to their true value. (See also the remarks of Bryson J in *Kingston v. Keprose Pty. Ltd.* (No.2) [1987] 6 ACLC 111 at 114 and those of Jacobs J in *Mercantile Mutual Life Insurance Co. Ltd. v. Actraint No. 85 Pty. Ltd.* [1990] 1 ACSR 569 at 578).

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Fair dealing

In *Weinberger*, [1983] 457 A 2d at 711, the Supreme Court of Delaware said that the notion of fair dealing embraces questions of when the transaction was timed, how it was initiated, structured, negotiated and disclosed and how approvals to the transactions by directors and other shareholders were obtained. In the forefront of the requirement of fair dealing is the

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- a* necessity for the majority shareholders through the company to make a full disclosure of all matters that may affect a judgment as to the fairness of the proposed alteration. (*Re John Labatt Ltd.* [1959] 20 DLR (2d) 159). This will usually mean the disclosure of the purpose of the transaction, the giving of full reasons for rejecting alternative means of achieving that purpose and for concluding that the compensation offered will be fair to those affected, and the obtaining of an independent valuation for the shareholders. In most cases, full disclosure
- b* will also require information concerning the current and historical market prices of the shares where they are applicable, the net book value of the assets, and the value of the company both as a going concern and on a liquidation together with any reports or appraisals prepared in relation to the alteration and any firm offers for, or serious inquiries about the purchase of, the assets of the company. (cf. the requirements in the United States Securities and Exchange Commission r. 13e-3 cited by Digby, *op. cit.* at 128-129 and the disclosure requirements in s. 672(3) of the Corporations Law). If litigation concerning the alteration
- c* ensues, these matters will need to be verified on oath if the company is to discharge the onus of proving that the alteration was valid.

The present case

- d* In the present case, the principal goal sought to be achieved by the alteration was in my view a legitimate business objective and one that would justify the expropriation of each appellant's shares provided that it was otherwise fair to **that** person. The alteration of the articles and the expropriation of the minority shares would enable the company to save over \$4 million dollars in taxes.

- e* In my opinion, however, the company has failed to prove that the expropriation was not oppressive. It is true that upon the evidence before the Court and having regard to the concessions of the appellants the price of \$1.365 per share may well have been a fair price for the shares. But the onus is on the company to prove that the price was fair, that the appellants have been dealt with fairly and that a full disclosure of all matters in relation to the alteration and expropriation has been made. The evidence falls far short of proving that the company and the majority shareholders have dealt with each appellant fairly. Almost no attempt was made to make the full disclosure that is required in this class of case.

- f* It follows that the resolution adopting Art. 20A was invalid. The appeal should be allowed.

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